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JAN 8 1965
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Supreme Court of the United States

OCTOBER TERM, 1964

No. 795

LUCIAN J. ROSSI,

Plaintiff-Petitioner,

—against—

WILLIAM MARX, CHARLES PUNIA, PHILIP LIPSTEIN, HELEN GORDON, General Partners, and HELEN S. MARX, LEONARD P. PUNIA, HERBERT PUNIA, CHARLES PUNIA, as Trustees for JEROME PUNIA, CHARLES GORDON, GRACE LIPSTEIN, PHILIP LIPSTEIN and HELEN GORDON, Limited Partners, doing business as PARK HILL APARTMENTS CO.,

Defendants-Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

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Statement

Petitioner appealed to the Appellate Division, First Judicial Department of the Supreme Court of the State of New York (hereinafter Appellate Division) from four orders of the Supreme Court, New York County (hereinafter Special Term), two of which denied petitioner's motions to enter judgment on default against the defendants, one of which directed petitioner to appear for examination before trial, and the fourth of which granted respondents' motion to dismiss the complaint. The first three orders are

clearly intermediate non-final orders. Only the fourth order dismissing the complaint may be deemed a final order.

The Appellate Division unanimously affirmed all four orders. The petitioner then appealed to the Court of Appeals of the State of New York and while his appeal appears directed to the entire order of the Appellate Division, it is clear that it was directed only against so much of the order of the Appellate Division as affirmed the order of Special Term dismissing the petitioner's complaint.

Since the affirmance of the Appellate Division was unanimous, petitioner would have a right to appeal to the Court of Appeals from the order of the Appellate Division only if it finally determined the action and there was "directly involved the construction of the constitution of the state or of the United States" (Section 5601 of the New York Civil Practice Law and Rules).

Respondents' motion in the Court of Appeals to dismiss the appeal was granted "upon the ground that no substantial constitutional question is directly involved."

Facts Material to the Question Presented

The New York Civil Practice Law and Rules (hereinafter CPLR) became effective September 1, 1963. An action in New York is commenced by the service of a summons (Section 304, CPLR).

On September 23, 1963, the petitioner commenced this action by serving a summons without a complaint.

On September 26, 1963, the respondent, Park Hill Apartments Co., served a notice of appearance.

On October 11, 1963, respondents' attorneys received petitioner's unverified complaint.

On October 23, 1963, respondent, Park Hill Apartment Co., joined issue by serving its answer and at the same time demanded a bill of particulars.

On October 30, 1963, respondents served a notice of examination before trial on petitioner personally, scheduling the examination for December 7, 1963.

On October 31, 1963, respondents' attorneys received by mail a notice of motion from petitioner to vacate the notice to examine him before trial and to compel respondents to amend their answer. This motion was denied by Special Term on November 22, 1963, at which time the Court directed the petitioner to appear for examination before trial on December 12, 1963, at 11:00 A.M. Petitioner was served with a copy of the Court's order by mail on December 2, 1963.

On December 12, 1963, petitioner failed to appear for examination before trial.

On December 13, 1963, respondents moved by motion returnable December 26, 1963, to dismiss petitioner's complaint because of his failure to submit himself to examination before trial. On January 8, 1964, Special Term denied respondents' motion to dismiss upon the ground that it did not appear that petitioner's failure to attend the examination before trial was deliberate or willful. However, the Court ordered the petitioner to pay respondents the sum of $20.00 for stenographic services incurred as a result of petitioner's default and directed petitioner "to appear for examination before trial at a time and place to be designated

by the defendants." A copy of this order together with a new notice pursuant to the order directing petitioner to appear for examination before trial at the Courthouse on January 20, 1964, at 10:00 A.M. were served on petitioner by mail on January 10, 1964.

Again, petitioner defaulted, and again respondents moved for an order dismissing the complaint because of petitioner's failure to appear for examination before trial. On January 30, 1964, Special Term granted respondents' motion to dismiss the complaint unless within 10 days after service of the order, with notice of entry, petitioner (a) paid the sum of $20.00 for stenographic services directed to be paid by the order of January 8, 1964, (b) paid an additional sum of $20.00 for stenographic services incurred by respondents on January 20, 1964, and (c) appeared for examination before trial at the Court on February 17, 1964.

Petitioner could have cured his defaults and avoided dismissal of his complaint by paying respondents the sum of $40.00 and by submitting himself to examination before trial. This he failed to do and accordingly, his complaint was dismissed.

ARGUMENT

The petition for certiorari should be denied in all respects because no substantial constitutional question is directly involved and because the determination of the New York courts rested on an adequate non-Federal ground.

Petitioner's complaint was dismissed because of his intentional refusal to appear on three different occasions to be examined before trial pursuant to order of the Supreme Court, New York County. If we understand petitioner's contention correctly, he argues that he was not required to appear for examination before trial until issue had been joined-and that the respondents had not joined issue on the amended complaint at the time that they served their notice to examine him before trial.

Petitioner claims that *Coleman* v. *Ted's Auto Sales Inc.*, 33 Misc. 2d 739, 34 Misc. 2d 100, affirmed 17 App. Div. 2d 827, motion for leave to appeal, dismissed 12 N.Y. 2d 833, supports his contention. In so far as the present issues are concerned, *Coleman* is merely a lower Court decision decided before the CPLR became effective. Three motions were involved in *Coleman,* the first relating to an order vacating the examination before trial, the second involving an order modifying a demand for a bill of particulars, and the third motion involving the sufficiency of pleadings. Only the decision of the lower Court relating to the motion to dismiss the pleadings for insufficiency was appealed to and affirmed by the Appellate Division. The Court of Appeals never affirmed the lower Courts but merely denied leave to appeal to that Court. Neither the Appellate Division nor the Court of Appeals ever passed upon the question of

priority of examination before trial despite petitioner's assertion to the contrary.

Even if the decision at Special Term in *Coleman* was good law in 1962, it is no longer applicable today. Since September 1, 1963 in New York, the right to examination before trial is no longer dependent upon joinder of issue. R. 3106 of the CPLR is similar to Rule 26(a) of the Federal Rules of Civil Procedure and provides that a defendant may take a deposition without leave of Court as soon as the action is commenced. Here the action was commenced on September 23, 1963 and respondents served their notice of examination before trial on October 30, 1963, returnable December 7, 1963. Respondents' notice to examine the petitioner before trial was proper and timely under the CPLR. (Cf. *Revesz* v. *Geiger*, 40 Misc. 2d 818; *Skrill* v. *Skrill*, 42 Misc. 2d 22; *Pakter* v. *Eli Lilly & Company*, 19 App. Div. 2d 810).

Section 3126 of the CPLR, which is based on Federal Rule 37(b) (3 Weinstein-Korn-Miller, New York Civil Practice, p. 31-230), provides that if a party fails to appear for examination before trial (id. p. 31-238) "the court may make such orders with regard to the failure or refusal as are just, among them:

* * * * *

> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

Section 3126 of the CPLR is constitutional. (*Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322; *Feingold* v. *Wal-*

worth Bros. Inc., 238 N.Y. 446; *Nasser* v. *Isthmian Lines*, 331 F. 2d 124, 2nd Cir. 1964).

Petitioner's refusal to appear for examination before trial on three different occasions, although ordered by the Court to do so, mandated the dismissal of the complaint. (*Macedo Soares, Inc.* v. *Guertzenstein*, 279 App. Div. 744.)

Respectfully submitted,

DREYER and TRAUB,
By SYLVAN D. FREEMAN,
Attorneys for Respondents.

January 7, 1965.